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Editorial

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A Comparative Analysis of Islamic and Common Laws of Contract

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Abstract

The role of contract in providing basis for man's affairs in virtually all his endeavours such as spiritual, social, economic and political necessitates its discussion. Comparison between Islamic and Common laws of contract which many works have not been adequately covered becomes expedient for better understanding of our interactions and knowing the more virile that serves the people better. Therefore, this paper analyses and compares the main principles of Islamic and Common laws of contract from the points of view of their coverage and elements. Using inductive qualitative methodology to explore some conceptual frameworks of Islamic sources and textual analysis of the main texts of Islamic and Common laws, the paper found that the rules of Islamic law of contract are very similar to those of common law of contract in the areas of offer, acceptance, mutual consent, terms of contract, *pacta sun servada* (abiding by stipulation of contract) etc. *Tadlīs* (fraud), *gharar* (misinterpretation), etc render contract invalid in both laws. Caveat emptor and caveat venditor are more pronounced in Islamic law than common law. Contracts that involve an insane person during his lucid period, non-*Sharī'ah* compliant products and services such as liquor, *ribā* (interest), gambling are null and void in Islamic law but they are allowed in common law. The paper concludes that the principles of contract are very similar under both laws though some differences exist in their details and applications. People should fulfil their contractual obligations to ensure peaceful coexistence, security, efficient and effective operation of businesses.

Keywords: Islamic law, common law, contract, *'iqd*

Introduction

Many times a day, people enter into contracts without realising that they have entered contractual relationship that involves contractual rights and responsibilities and the possibility of instituting a legal recourse if those mutual expectations are not fulfilled. Contract is used to achieve economic, spiritual, social and political objectives. In addition to this point, trade and other affairs in this world will continue to be conducted between two or more parties which will necessitate entering into a contract. The purpose of both Islamic and Common laws of contract is to provide the main guidelines for people to attain good life and peaceful coexistence. It must be mentioned that western law of contract which originated from moral theology during pre-Christian and Christian eras which started about 18th century grew out of the economic and legal theories of the period. Its development has been linked to the industrial revolution. 19th century is considered as the golden age of contract; this is because it was at this

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time that the law of contract evolved into the structure we are using today. Islamic law of contract had been put in full gear right from the seventh century and it grew within its sources (e.g. The Qur'an and the Sunnah) and not out of economic and legal theories of the period[2]. What determines the lawfulness of a contract in Islam is the Qur'an and the Sunnah. Therefore, all contracts are presumed to be lawful unless they are forbidden by the two sources of the Sharī'ah (The Qur'an and the Sunnah) i.e. the principles in these sources guide the general direction of Islamic law of contracts.

Contract is considered one of the most important topics in Islamic law because it permeates all affairs and has continuous practical applications in all human endeavours. It stems from covenants i.e. promises and it is present in affairs such as social, political, economic etc. It is seen in relationship between parents and children, teachers and students, rulers and the ruled, landlords and tenants, solicitors and clients, sellers and buyers, one nation and another, to mention but a few. In all these contractual relationships, there must be a *pact sunt servanda* (all promises must be kept and fulfilled). No one except God is self-sufficient. Man, as a social being by nature will need other people in one way or the other in his general affairs: social, political and economic etc. In doing this, he has to enter into a contract with others in order to benefit each other. Considering the complex nature of men particularly those people who could not control their souls which always command them to do bad things, break promises, usurp other people's rights, abandon their own obligations etc (Q.12: 53), both the common and the Islamic laws have rules guiding the operation of contract. This prevents man from taking what does not belong to him and protects his rights from getting lost. The resulting effect of this mechanism is that the world runs properly and people live peacefully with one another.

The relevance of contract to solve contemporary social, political, economic and multi-faceted challenges of man and to contribute to the national development is yet to be understood by a large number of people and scholars. Therefore, using inductive and textual analysis methods, the paper compares Islamic and common laws of contract. It takes up points of similarities and differences between Islamic and conventional laws of contract from the point of view of their sources and elements. The study uses comparative subjective -method to discuss contract from both perspectives. This is because it relies on the primary and secondary sources of the Sharī'ah without restricting our discussion and stand to any specific school of Islamic law because they derived their views from the same sources. However, we benefited from their arguments. We did not go into details of law of contract. We are satisfied with the broad principles. The rest of the paper is organised as follows. The next section gives different definitions of contract from both Common Law perspective and Islamic view. Conceptual explanations of contract, multi-dimensionality of Islamic law of contract, economic contract and its principles in Islamic law of contract and the elements of contract in Islam form our discussions in the following sections. Our main discussion is under similarities and dissimilarities between Islamic and Common laws of contract. The last section consists of merits of contract, some findings, recommendations and conclusion.

Conceptual Explanations of Contract

The word contract has not been pinned down to one definition. Different authors defined it from different perspectives. It is an agreement between two or more parties which is legally

[2] Noor Mohammad, 'Principles of Islamic Contract Law', *Journal of Law and Religions*. vol. 6.1, 1998, 116-117.

enforceable[3]. Yerokun considers 'contract to be concerned with relation between persons which the law will recognise and enforce where one of the parties fails to perform his/her part of the bargain'[4]. It must be quickly mentioned that the enforcement of law is not limited to human persons, but it extends to artificial persons e.g. companies, corporate bodies, business associations etc. that possess an identity called legal entity. It is also described as a voluntary agreement between two or more persons which confers legally enforceable rights, duties and liabilities on the parties. Again, it can be defined as the agreements between two or more people, which are legally enforceable[5]. It can as well be viewed as all agreements made by free consent of parties competent to contract, for a lawful consideration and with lawful object, and are not hereby declared void. Contract signifies some sort of agreement in both laws of contract[6]. However, not all agreements are contracts. But all contracts involve some sort of agreement. This is because, agreement becomes contract when the parties intend to be legally bound to fulfil the obligations, i.e. if one party performs his/her own side of the contract and the other party breaks his/her own part, the person who has fulfilled his/her obligation can institute a legal action against the other who fails to perform his/her own part of the contract. By implication, it then suggests that, if legal enforcement is absent, it is an ordinary agreement.

Agreement and legal obligation are common element in all the above stated definitions. That is, parties must enter into a contract willingly without coercion; and if one of the parties fails to perform his/her part, the other party can institute a legal action against him to enforce the promise. It must also be mentioned that every contract is an agreement but not vice versa i.e. not every agreement is a contract. For instance, if a person agrees to attend a wedding ceremony of a person and for one reason or the other, he/she could not attend it, the person inviting him/her cannot sue such an individual who could not fulfil the promise of attending the wedding ceremony. This is because there is no intention to create legal relations.

Contract is classified into different ways based on execution, enforceability and creation. If both the parties to a contract have fulfilled their respective obligations, it is executed contract. But if none of the parties has performed his/her respective obligations, it is called executory[7]. Partly executed and partly executory when one has done his/her own part while the other has not fulfilled his/her own obligations respectively[8]. As regards classification based on enforceability, a contract that satisfies all the conditions prescribed by law is valid. Quasi or constructive contract is when there is no intention from the two parties to create a contract but the law imposes it to prevent unjust enrichment. For instance, if a person receives a commodity which is not meant for him/her. He/she should return it or pay its price. A formal contract is a contract made in writing, signed, sealed and delivered, while simple contract does not carry the seal of the signer. The latter needs consideration before it can be effective. A unilateral contract is where one party makes an express promise to do something in return for an act of the other party without first securing a reciprocal agreement from the other party, e.g. Carlill versus Carbolic Smoke Ball Company Ltd (1892). In this case, the company offered to pay £100 to anyone who contracted influenza after using the company's product. Carlil purchased it and

[3] Bryan A. Garner, *Black's Law Dictionary*,9th Edition, (USA, West Publishing Company,- 2009), 365.
[4] Olusegun Yerokun, *Modern Law of Contract*, (Lagos: Nigerian Revenue Projects Publications 2004), 2.
[5] K.R. Abbott, and N. Pendlebury, *Business Law*, (Hampshire: D.P. Publication Ltd. 1987),103.
[6] I.E Sagay, *Nigerian Law of Contract*, 2nd ed. (Ibadan: Spectrum, 2000), 1
[7] P.S. Atiyah, An Introduction to the Law of Contract 3rd ed. (London: Oxford University Press, 1989), 45.
[8] Bryan A. Garner, *Black's Law Dictionary*,9th Edition, (USA, West Publishing Company, 2009), 369.

used it in line with the instruction and still caught influenza i.e. it did not cure her illness. She sued the company when it refused to pay and won; this is because the court held that the advert was a valid offer which was duly accepted by her when she purchased the product[9]. A bilateral contract is a contract that consists of an exchange of promises i.e. a promise (or promises) from one party in an exchange for a promise or promises from the other party[10]. A contract with no legal effect is called void contract. This contract is devoid of normal requirements for its creation or it may be against the law. It is void if a contract has one or both of the following conditions: lacking normal requirements of contracts and going against the law. A voidable contract is when an aggrieved party sets aside the contract whose consent has been obtained through fraud despite the presence of all the elements. Illegal contract is a contract that is against the law. Express contract is a contract that is explicitly made by words of mouth or by writing while implied contract is made through conduct or otherwise[11].

An Overview of the Multi-dimensionality of Islamic Law of Contract

Of the words that refer to contract in Islam, '*Ahd* (engagement/ covenant), *'Iqd* (contract) and *Mīthāq* (covenant) are very clear about the importance of fulfilling the covenants. The word '*Ahd*' and its derivatives are used in the *Qur'ān* in about 45 verses. '*Mīthāq*' occurs in about 25 *Qur'ān*ic verses while '*Iqd*' and its derivatives occur about seven times in the *Qur'ān*[12]. Based on the uses of these three words and the similar ones as contained in the *Qur'ān* and Hadith, law of contracts in Islam is multi-dimensional. It can be spiritual, social, political and economic.

Spiritual Contract

The spiritual contract is between man and Allah. It is the individual's obligation to Allah. The obligation is the promise of man to worship Him. "It is you that we worship and from you we ask for help" (Q1:5). "Those who are true to their bond with Allah and never break their covenant" (Q13:20). This is the very first covenant between Allah and man at the beginning of creation when man promised Allah that he would worship none but Him. *Ahd* refers to a unilateral contract made by a person. It can also mean a bilateral contract. Allah in Q.17:34 asks man to fulfill the contract he has made. Man is also reminded that the discharge of contract is not limited to this world but if not discharged here, it is going to be discharged in the hereafter. Bilateral contract is referred to in the Qur'an (Q2:40) where Allah says He will fulfill His promise; therefore man should also fulfill his promise. By extension, it means the two parties to a contract should fulfill their obligations despite the fact that Allah cannot go back on His words or promises.

Political Contract

The political contract refers to treaty obligations of any candidate for political posts and the electorate. It is the position of authority, which is entrusted to man. He is to be asked how he manages the affairs of the state. Holding a position of authority is a trust in lslam and the holder

[9] Oladele Olayiwola, Emiaso Miapo, Olaiya and Oransanya Lekan, Business Law (Lagos: Institute of Chartered Accountants of Nigeria, 2014), 127

[10] Catherine Elliot and Frances Quinn, Contract Law, 3rd ed. (London: Longman Press, United Kingdom 2001),10

[11] Bryan A. Garner, *Black's Law Dictionary*,9th Edition, (USA, West Publishing Company, 2009), 368

[12] Muhammad Fuad Abdul Baaqii, *Al-Mu'jamul Fahris Li-alfaazil Qur'an,* (Beirut: Darul Marifah,1991), 2-947.

is accountable to the electorate in this world and Allah on the Day of Judgement. The contract between the electorate and the elected does not end here (Q33. 72; Q.38:26). The Prophet also said:

وكلكم راع وكلكم مسءول عن رعيته (*wa kulukun rā'in wakulukun mas'ūlun an rā'iyatihi)*[13]

'…So, all of you are guardians; and you all shall be asked how you have managed the affairs of people (resources) under you'.

Social Contract

Men and women were created to socialise together, to love one another, to work, to procreate children and live peacefully. It is difficult, if not impossible, to see a person living alone forever without interacting with others. All our interactions are guided by rules and regulations as contained in the Qur'ān and Hadith. Some interactions must be formally established while others are presumed to be established by our coming together. The examples of the latter are our relationship with our neighbours, our classmates, our office mates etc. This is social contract, which must be respected by individuals. Marriage is an example because there are some formal rules and regulations guiding the relationship (Q. 30:21). Extra-marital relationships are examples of void social contract (Q. 17:22). Celibacy is also not allowed in Islam.

> *Yaa ma'shara ash shabābman istatā'a minkumul bā'ah falyatazawwaja fa'innahu aghda lilbasar wa ahsanu lil faraj.*
>
> O! You young men, whoever is able to marry should marry, for that will help him to lower his gaze and guard his modesty[14]

Marriage is an example of Islamic social contract. This is evidenced in the use of *Mīthāq* in Q. 4:2 when Allah says: "for how can you take it back dower, when you have lain with each other, and entered a firm contract". This is an indication that such a contract should not be taken with levity because it is a sacred contract, which must be guarded jealously. Both parties in a contract of marriage have been charged with different responsibilities with a view to establishing the relationship on a good footing. If this is achieved, there will be peace, security, love etc. among the members of the society. The nation will, in turn, be built on a strong foundation.

Contract of Islamic Marriage and its Conditions

Marriage (*nikāh*) is a permanent and unconditional civil contract (which comes into immediate effect) made between two persons of opposite sexes with a view to accessing mutual enjoyment and procreation and legalizing of children (Q. 30:21). A contract of marriage differs from other contracts in the sense that, it is seen as a permanent contract. However, the contract is subject to certain rules of restriction. Death or divorce can only terminate the contract. The object of Islamic marriage is not only the procreation of children but also love and mutual enjoyment. That is why marriage can be contracted even at the point of death or old age when there is no hope of children. Islamic marriage contract comes into immediate effect without any condition. It should not be a temporary marriage for a fixed term. An adult person, male or female, can

[13] B.A. Bashir, *A Selection of the Sayings of the Holy Prophet*, (Pakistan: Nuurat Art Press, 1958), 145.
[14] A.I. Doi, *Sharī'ah - The Islamic Law*, (London: Ta Ha Publishers, 1984), 115.

enter into a contract of marriage. It is not allowed for a minor or a person of unsound mind to enter into contract of marriage in Islam[15].

Elements of Contract of Islamic Marriage

There must be *sīghah* (forms) before contracting a valid Islamic marriage. The proposal (*'ījāb*) and consent (*qabūl*) must be made on the free consent of the contracting parties. Consent obtained by fraud or coercion invalidates the marriage. Both proposal and acceptance are made in the presence of two males or one male and two female witnesses (Q. 2:282). It is allowed for guardians to make such proposals on behalf of minors and persons of unsound mind. Agents can be made to perform these roles. However, they must be sane and adults. They must also act within the scope of the authority given to them. In Islam, offer (*'Ījāb*) and acceptance can be conveyed by words, writing, gesture or indication, conduct[16] (e.g. smiling, etc). No special form is prescribed. Whatever form that is used must be understandable by the parties.

Another essential of contract of Islamic marriage is *maḥr* (Dower) i.e. the gift given to the bride. This gift is mainly meant for the bride. It is not her parents' gift in Islam. Giving the bride's parents goods and property requested by them as a *maḥr* i.e. dower before they could give their children in marriage as practised in Nigeria is never part of requirements of valid Islamic marriage. However, if it is given voluntarily, it is not against the Islamic injunction. This practice is common in the western part of the country. In fact, the *Qur'ān* allows the bride to forego her right to dower if she wishes and the marriage is still valid (Q.4:4).

Economic Contract and its Principles in Islamic Law of Contract: The Checklist

Economic contract is a contract that is enforceable. Of the three words mentioned, '*Iqd* is the most appropriate of the commercial contracts. The word includes both general and specific contracts. The Qur'an (Q.5:1) asks all parties to a contract to fulfill all obligations. The prerequisite for the validity of a contract is free mutual consent, i.e. the contracting parties must not be forced to enter into any contract. It should be done by them willingly (Q.4: 29). The Prophet was reported to have said: 'the contract of sale is valid only by mutual consent' (Ibn Majah). A contract that involves *ribā* (interest) whether simple or compound is invalid in Islam (Q.2:275- 279). Any contract that involves gambling and games of chance is un-Islamic (Q.5:90). Fraud and deception (*Khilābah* and *Ghishsh*) must be absent in a contract within Islamic law. Contracts must be devoid of fraud and cheating (Q.83:1-6). Contingent sale, false swearing, hiding defects, short weight etc are not allowed in a contract[17].

A contract that is against Islam, life, progeny, intellect and property is not in line with the Islamic law (Q.5:32, Q.2:179, Q.4:29). The sharing of profit and loss is also a condition that is essential when transacting a business. The parties to a contract must share loss and profit. A person is qualified to share profit provided he is ready to share the loss arisen from the same contract. "Usufruct devolves with liability"[18]. Any contract that is not expressly or explicitly prohibited is allowed or permissible. Moreover, if a contract is not against the text of the *Qur'ān*

[15] M.K. Kareem, *Advanced Muslim Law* (Ibadan: Open and Distance Learning Centre, University of Ibadan, Nigeria, 2011), 1-108

[16] Muhammad Tahir Mansur, *Islamic Law of Contracts and Business Transactions* (Pakistan: *Sharī'ah* Academy International Islamic University Islamabad, 2005), 26-29.

[17] M. .I. Ismail, *Bulughul Marami.* part I, (Riyadh: Dar-us-salam Publications, 1996), 279-280

[18] M. .I. Ismail, 279-280

or Hadith expressly or by implication, such a contract is lawful for a Muslim to do or to participate (Q. 45:13; Q. 6:145; Q.7:32). This principle allows different communities to enact laws for themselves to meet new challenges. The enacted laws should not go against the *Qur'ān* and must not make lawful what is forbidden in the *Qur'ān* and Hadith (Q.6:119) "He has explained to you that which is forbidden". In order to protect the public, a valid contract is expected to contain elements prescribed by Islamic law and common law before it can be enforceable.

A contract that is Islamic must be devoid of *gharar* (uncertainty)[19]. It is *gharar* when the parties do not know an object of contract or its acquisition is in doubt or its quantum is not known e.g. foetus in the womb, sale of fish in the water, birds in the air etc[20]. *Gharar* as a term cannot be pinned down to a definition. It is a term that covers many aspects of the rules of contract. *Gharar* literally means danger, risk, delusion, misleading, uncertainty, exposure to perish, without prior knowledge, etc. in Islamic jurisprudence[21]. *Tadlis* (fraud), *gharar* (misinterpretation), *ghabn* (cheating), *gishsh* (deception) etc are words that render contract invalid because they are different forms of fraud that are prohibited in Islam. The words and similar ones though they are slightly different in their usages, virtually express the same thing. They are one substance with different forms. They are used to induce a party to enter into contract which ordinarily he would not enter without using them[22]. *Gharar* cannot only mean risk because everybody risks one thing or the other. In fact, many Islamic financial contracts are based on risk-sharing (*mukhtarah*) between the parties to a contract through profit-loss sharing arrangement. It is not possible to avoid all forms of risks because there is no business or human activity that does not have its risk. For instance, the parties to a contract face the issues of making a profit or incurring a loss. Many circumstances such as changes in prices of goods, supplementary goods, complementary goods etc from time to time, day to day, year to year, season to season, etc may happen to make them gain or incur loss.

Gharar can be referred to as an excessive risk when one's loss is the gain of the other as in gambling[23]. Referring selling what is not in existence yet as *gharar* is not always correct. Prohibition is not limited to non-existent products; it covers also some products that are in existence. It is not the state of the non-existence or existence that makes them prohibited. It is uncertainty, doubt and lack of knowledge regarding the subject matter. Lack of knowledge, uncertainty and doubt can be eliminated if the quality, quantity and special requirements of the present and future goods are known. The knowledge may be through modern technology. What is not known and certain to one person may be known and certain to another person if the latter has the necessary devices. The real causes of *gharar* are lack of control and knowledge of the description, quantity, quality, safe future readiness of the subject matter such as foetus still in the womb, sale of fruits and agricultural products prior to their cultivation, birds in the air, fish in the water etc. 'Do not sell what you do not have'[24]. This Hadith refers to the prohibition of

[19] A. Nehd, and A. Khanfanr, A Critical Analysis of the Concept of Gharar in Islamic Financial Contracts: Different Perspective, *Journal of Economic Cooperation and Development*, 37, 1, (2016), 1-24.

[20] M., I. Ismail , *Bulughul Marami.* part I. (Riyadh: Dar-us-salam publications, 1996) 287-289.

[21] Ibn Manzur, Muhammad ibn Mukram, Lisan al-Arab(Beirut: Dar Ihya, al-Turath al-Arabi, 1995), 42

[22] A. Nehad and A. kanfar, 1-24.

[23] Mahdi Zahraa, and Shafaai M. Mahmor, "The Validity of Contracts When the Goods Are Not Yet in Existence in the Islamic Law of Sale of Goods", in *Arab Law Quarterly*, Vol. 17, No. 4, 2002, 379-397.

[24] M.I. Ismail, *Bulughul Marami.* part I., (Riyadh: Dar-us-salam publications, 1996), 279-280

the sale of an existing object that the seller himself is not the owner. The Hadith cannot be used for the prohibition of non-existing goods. Al-Kasani pointed out that:

> Hakim ibn Hizam used to sell goods that he did not own by taking the price from a prospective buyer, then he would go to the market to purchase the goods, and then he would deliver them to the buyer. This scenario was brought to the attention of the prophet (PBUH) who then stated the wording of the hadith above. This scenario clearly shows that it is the ownership and not the existence that has been addressed by the Prophet's Hadith[25].

The object that is non-existent at the time of the contract but shall necessarily/certainly occur in the future is a valid subject but the ones that are permanently non-existent is prohibited. Through the modern advanced technology, the sophisticated equipment and devices are able to determine the physical description of the foetus, its wellbeing, its sex etc. *Gharar* (uncertainty) can only exist in the form of death before, during and after the birth process. This is outside man's control. *Salam* is a sale of non-existent product at the times of the contract; it is a sale based on the condition that the kind, quality and quantity of the goods are well spelt out to avoid *gharar*. The sale of future fruit and agricultural products is also valid provided their description, quality and quantity are clearly stated; and their production is not confined to a particular land[26]. Therefore, the sale of fruit and agricultural products in the future is Sharī'ah compliant and valid in the absence of doubt and uncertainty and the presence of safe availability of the subject matter and provision of sufficient parameters to determine the price, the quality and quantity of the said subject matter which may be through usage, custom or modern advanced technology.

The Elements of contract in Islam

***'Ījāb & Qabūl* (Offer and Acceptance)** القبول و الايجاب. In all forms of contracts, there must be willingness on the parts of the parties. At least there have to be two parties to a contract and they should avoid any kind of duress. Such willingness may be communicated by way of speech, an action or any other indication which is understood by all parties concerned. 'Ī*jāb* must link with *qabūl* before the contract can be concluded. Offer and acceptance can be conveyed through words, as they are the bases of all kinds of expression. Writing (Q. 2: 282), gesture or indication, conduct etc are other ways of making an offer. However, the Islamic jurists state that the validity of making contracts through conduct must involve two people, consent of the parties and the smallness of the subject matter[27].

The subject-matter معقودعليه

The second element is the subject matter, which includes commodity, performance, consideration and object of the contract. Consideration which is the value or the price given in return for the value received must be *Sharī'ah* compliant and should not be an independent element. In Islam, commodity is the consideration for the purchaser while the price paid by the purchaser and received by the seller is the consideration for the seller. The subject matter must

[25] Al-Kasani, 'Ala' al-Din, Badai' al-Sanai', 2nd ed., Beirut: Dar al-Hadith, 1986, Vol.4, 147

[26] Mahdi Zahraa and Shafaai M. Mahmor ,The Validity of Contracts When the Goods Are Not Yet in Existence in the Islamic Law of Sale of Goods, *Arab Law Quarterly*, Vol. 17, No. 4, 2002, 379-397;

[27] Tahir Mansur, *Islamic Law of Contracts and Business Transactions* (Pakistan: *Sharī'ah* Academy International Islamic University Islamabad, 2005), 26-29.

be *Sharī'ah* compliant. Examples of performance that are not *Sharī'ah* compliant are prostitution, obscenity etc. Pork, wine, dead animal, blood, any kind of intoxicant etc are examples of commodity that are not *Sharī'ah* compliant under the subject matter[28]. Anything declared expressly or impliedly by Islam as *haram* cannot form the subject matter[29]. The subject matter must also be determined in terms of its essence, quality, quantity and value through examination or description or both in order to do away any vagueness and uncertainty.

Object is the intention of the offeror and the offeree. The objective or purpose of entering into a contract must be lawful and should not oppose the *Qur'ān*ic text and Hadith as 'actions would be judged according to one's intention'. [30]انما الاعمال بالنيات

If a person wants to buy a house, which he wants to turn into a brothel to accommodate prostitutes, the objective is unlawful. However, buying a house is lawful. Therefore, any contract that promotes immoralities or harms others is unlawful. The motivating purpose must be legal. Marry for re-marriage, grapes to extract liquor, sale and buy back etc are examples of unlawful contract due to bad intention. The person enters into unlawful things through the backdoors. No encumbrance should be attached to the subject matter and should be in actual existence at the time of contract. It should be capable of being acquired and delivered to a prospective buyer in the future. *Gharar* (uncertainty) must be avoided. Some transactions that are uncertain are sale of fish still in water, foetus yet in the womb, milk in the udder etc. *Nemo dat Quod non-habet* (do not sell what you do not have) is very relevant as a seller should not sell what he does not own[31]. However, in every rule there is always an exception. *Salam* sale is an exception because the purchaser pays price in advance and the delivery of goods is delayed to a specified time[32]. In *salam* sale, the kinds, qualities, quantities, certainty of delivery and value must be determined[33]. This is in line with the Hadith of the Prophet: "Whoever pays money in advance for dates (to be delivered) later should pay it for known and specified weight and measure of the dates[34].

Capacity of Contracting Parties عاقدان

The third element of contract is capacity of contracting parties. The parties to a contract must have legal capacity called *ahliyyat al-ada*[35]. As regards the execution of the contract, its legal effects may be worldly punishments, rewards, or punishments in the hereafter, or fulfillment of obligations. The legal effect is reward or punishment if it concerns *'ibādah* (worship). One is considered capable if one has reached the age of puberty, which is the first ejaculation in a

[28] Yusuf al-Qaradawi, *The Lawful and the Prohibited in Islam* (Lagos: At-Tawheed Publishing Company, 1989), 69.

[29] Abdul Hamid Siddiqi, *Sahih Muslim*, Volume 3, (Beirnt: Dar Al-Arabia, n.d.), 793-810

[30] Jamal, A.B.n.d. *Commentary on the Forty Hadith of An-Nawawi*, (Malaysia: International Islamic University Malaysia, n.d.) 4

[31] Muhammad Rahimuddin, *Muwatta Imam Malik.* (Beirut: 1F litibaa'ah wan-nashr, 1989), 610-611

[32] Muslehuddin Muhammad, *Insurance and Islamic law*(Lahore: Islamic publications Ltd. 1990), 115

[33] M.K. Kareem, "The Nigerian Statements of Accounting Standards and *Ribh* (Profit) in an Islamic Economy", *Ibadan Journal of Humanistic Studies,* No. 21 & 22, 2011/2012, 334 – 367; and M.K. Kareem, "Islamic Banking and Sharī'ah Scholars in Nigeria", *Journal of Rotterdam Islamic and Social Sciences* (JRISS), Vol. 7, No.1, 2016, 117-143.

[34] Muhammad Muhsin Khan, *Sahih Bukhar* (Turkey. Hall Yayinlari n.d), 243-245

[35] Md. Abdul Jalil and Rahman Khalilur-Rahman, "Islamic Law of Contract is Getting Momentum", in *International Journal of Business and Social Science*, 2010, 175-192 .

male and the first menstruation in a female. As regards the age of maturity, Shafi', Abu Hanifah and the compiler of al – Majallah put it to 15years. The *Hidāyah* puts the age of maturity for females at nine years while that of males at 12years. Based on these, a minor cannot enter into a contract[36]. However, if a guardian ratifies the contract that is a necessity for him, he can be a party to a contract. When a minor reaches the age of *rushd* (reason and discretion), he can enter into any contract as contained in the Qur'an (Q.4: 6). "…If then you find sound judgment in them, release their property to them''. In addition to puberty, a contracting person must be of sound mind, mature in his action. *Junūn* (insanity or mental derangement), *Atah* (partial insanity), *nisyān* (forgetfulness), *safah* (prodigality, weakness of intellect) and *taflis* (bankruptcy) are some of those things that can render capacity of contracting parties null and void. Death-illness (*maradul mawt*) cannot impair one's legal capacity to enter into a contract.

Matuh is partial or temporarily insane person who acts sometimes like a sane person and some other times like an insane person. Therefore, *Junūn*, *Atah*, insanity and partial insanity make contract entered into vitiated because of lack of sense of discrimination (*rushd*). My *ummah* is forgiven that which they have done through mistake and forgetfulness or coercion, the Prophet said. The financial matters must be handled with the dictate of reason. Any person who cannot handle them with the dictate of reason should not enter into a contract. *Ribā*, unlawful subject matter, insanity, illegal purpose, immaturity, etc vitiate contracts in Islam[37].

Similarities and dissimilarities between Islamic and Common laws of contract

By means of contracts, the exchange of property, work and services come into existence. It is important for people to know the similarities and differences between the Islamic and the common laws of contract so that conscious Muslims will act upon them for the improvement of cordial relationships and dealings between themselves and their fellow human beings. Although there are certain differences between contracts in common and Islamic laws, the similarities are much greater between the two laws. They differ in their respective sources and some elements. Islamic law of contract is of divine origin because its source is the Qur'an which was revealed to Prophet Muhammad. Common law is a man-made law and is secular in character and amenable to changes.

Philosophy of Contract in Islamic and Common Laws

Allah, being the creator of the heavens and earth, what is under the earth and what is in the heaven and what is between them (Q.20:6), has provided in the Qur'an and the Sunnah the legal principles that guide the affairs of man on earth be it social, political, economic and moral. The two sources provide broad principles in most cases. The details of applications and interpretations are left to Islamic scholars. That is, the government through the parliament can fashion necessary laws on *muaamalah* (social interaction) including contracts without violating the basic legal principles in the said two sources. For instance, when a loan is given, the Qur'an provides provisions for writing down the terms of loans; and that witnesses should be called to

[36] Muhammad Tahir Mansur, *Islamic Law of Contracts and Business Transactions*, Pakistan: *Sharī'ah* Academy International Islamic University Islamabad,2005, 46-59

[37] Muhammad Tahir Mansur,

testify to it so that the people who enter into the contract of loan do not forget later the term of loan agreement.

The interest of man in this world and the hereafter is taken into consideration, the objective of the Sharī'ah is to preserve religion, life, progeny, intellect and property. It is worth mentioning that when a contract is made between two or more people, they are not the only people involved, Allah is also involved ((48:10). Each of the parties is accountable to Him. This means discharge of contract does not end here, it ends on the Day of Judgement. With respect to this philosophy of Islam on contract, Allah says: 'The hand of Allah is over their hands. So, whoever breaks his oath, breaks it to his own loss; and whoever fulfils the covenant that he has made with Allah, He will surely give him a great reward…' Q.48:10. O you who believe, why do you say what you do not? Most hateful is it in the sight of Allah that you say what you do not (Q.61: 2-3). In relation to this philosophy, the Prophet of Islam (PBUH) is reported by Abu Hurayrah to have said: 'Allah the Most High said, I am the third (partner) of two partners as long as one of them does not cheat his companion, but when he cheats, I depart from them'[38]. This is not in the view of the contracting parties in common law. They do not recognise the hand of God in their dealings. They believe in only their bargaining power. Before a contract can be valid, the following elements must be present in both Islamic and common laws of contract though with some differences.

Offer ('*Ījāb*)

Offer refers to an expression of willingness made by an offeror to be bound by the terms of contract if accepted. If an offer is to be binding, it must be definite or precise i.e. its terms must not be ambiguous, which by implication means that it must be clearly defined. The use of some, about and similar words (e.g. some books, about 100 sacks of maize etc.) must be avoided. It must be known and communicated. Consideration must be attached to it. All the above-stated characteristics are in line with the rules of offer in Islamic law of contract. Offer must not be ambiguous. The Prophet said, 'leave what you are in doubt to what you are sure of'. Another hadith corroborates unambiguity of the offer when it warns not to move close to *mushtabihhat* (ambiguous things). It maintains that:

> From Abu Abdullahi al-Nu'man son of Bashir who said: 'I heard the apostle of God saying: Verily, what is lawful is obvious, and what is unlawful is obvious, but between the two are matters which are ambiguous and about which many people know not what to do. He who is on his guard with respect to the ambiguous things keeps his religion and his honour clean, but he who falls in the ambiguous things falls into the unlawful. Just like the shepherd who pastures his flock round about the forbidden area is on the way to pasturing them in it. Is it not a fact that every ruler has a forbidden area of his own, and is not God's forbidden area His sacred place? Is it not a fact that in the body there is a mass through whose healthiness the whole body is healthy, and through whose being diseased the body is dead? And is not this the heart? Both Bukhari and Muslim relate this[39]

'O you who have believed, do not consume one another's wealth unjustly but only in lawful business by mutual consent (*taraadii*). And do not kill yourselves or one another. Indeed, Allah

[38] M. I. Ismail , *Bulughul Marami* part I, (Riyadh: Dar-us-Salam Publications, 1996), 309-310

[39] O.A. Musa Abdul, *The Selected Traditions of Al-Nawawi, Forty Traditions of Al-Nawawi,* (Lagos: Islamic Publications Bureau, 1982), 29-30

is to you ever merciful' (Q.4:29). In this verse, Allah instructs those who believe in Him to perform their contracts. Allah says it must be with mutual consent. This is a restraint on contract so that people would not take advantage of others by forcing them to accept unfair agreement. It is also to block agreement injurious to the public.

The area of difference between the two laws is that while conventional law allows Sharī'ah compliant and non- Sharī'ah compliant products and services to be offered if they are in line with the constitution and other statutes of the land, Islamic law of contract allows only the products and services in line with the Sharī'ah to be offered. In Islamic law of contract, you cannot offer products and services such as pork, liquor, pornography, gambling, lottery etc. (Q.17:32; Q.24: 30; Q.24: 2, Q.5: 90-91). Offer and treat are not the same but the latter can lead to the former. Treat is an invitation to come and make an offer[40]. For instance, an advertisement- tenders, auctions, passenger tickets and goods displayed with prices tagged on them are all invitations to prospective customers to make an offer. When the prospective buyer or customer shows interest and makes a move to buy it, he is making an offer. He is an offeror and the seller is an offeree.

Fundamentally, it must be noted that an invitation to treat is not an offer that can be accepted to lead to an agreement. Therefore, it cannot form the basis of any course of action. An offer becomes discharged or terminated if any of these occurs: counter offer, lapse of time, rejection and death of an offeror before acceptance. However, if the offeror dies and the offeree accepts the offer without knowing the offeror's death and the contract does not involve personal performance, the contract is valid if it is performed. Offer and acceptance can be made by words of mouth, writing (Q2:282), gesture and conduct. As regards the last two forms, the majority of Islamic jurists allow them if the item of a contract is of small value. Offer and acceptance may be expressed through writing or any other methods accepted by customs which are not against the Sharī'ah [41]. But the Qur'an favours writing when the parties want to seal the contract between them (Q2:282).

Acceptance (*qabūl*)

An acceptance of an offer is an indication, expressed or implied by the offeree made while the offer is still open and in the manner requested in the offer of the offeree's willingness to be bound unconditionally to a contract with the offeror in the terms stated in the offer[42]. This definition in common law by Yerokun echoed the stand of Islam as regards acceptance of an offer (Q.2:282; Q.4:29). *Majlis* (one meeting) is assumed to take place as long as the meeting continues. The meeting may take some time to finalise the terms of contract for the offerors and the offeree to take a wise decision and evaluation of the profitability or otherwise of the contract. Offer and counter offer will continue through bargaining till there is a mutual agreement between the parties.

Consideration

[40] Oladele Olayiwola,Emiaso Miapo, Olaiya and Oransanya Lekan,, Business Law, (Lagos: Institute of Chartered Accountants of Nigeria, 2014), 126-128

[41] Muhammad Tahir Mansur, *Islamic Law of Contracts and Business Transactions*, (Pakistan: *Sharī'ah* Academy International Islamic University Islamabad, 2005), 26-32.

[42]Olusegun Yerokun, *Modern Law of Contract*, (Lagos: Nigerian Revenue Projects Publications, 2004), 28.

Consideration is the price paid by the offeree (promisee) in exchange for the promise of the offeror (promisor). Another comprehensive and most referred definition of consideration as cited by Yerokun is that 'consideration is a valuable consideration in the eye of the law which may consist of some right, interest, profit or benefit, accruing to one party or some forbearance, detriment loss or responsibility given, suffered and undertaken by the other'[43]. As good as this definition is, it contains interest (*ribā*). This consideration is not Sharī'ah compliant. This is because it is unequivocally condemned and prohibited in Islam as contained in Q.2: 275-279. This was noted under the checklist in this paper. Therefore, any contract whose consideration or subject matter involves *ribā* is a null and void contract. It is not enforceable. In common law, this is allowed. This is one of the areas of major differences between Islamic and common laws of contract. In both laws, consideration must not be past i.e. the price paid before the contract came into existence cannot be used as consideration for the contract at hand. Consideration may be sufficient but it may not be adequate.

Again, sufficiency of consideration means it has some value in the eyes of the law. The value must be definite, ascertainable and meaningful. In the absence of fraud, duress and misrepresentation, consideration needs not be adequate in as much as it is acceptable to the offeror. Therefore, no consideration is too small or too much. Inadequate consideration is acceptable and does not render a contract invalid provided the parties are satisfied and consented freely to the agreement without undue influence, all forms of fraud, coercion and other ambiguities. For instance, if a person agrees willingly to sell his house say, for ₦1m (one million naira) which is far less than the market value of the house say, ₦100m (one hundred million naira). That ₦1 m (one million naira) is sufficient though it may not be equivalent economic value. If the adequacy of consideration is considered by the parties at the time of making the contract and they all agreed on the price, the consideration is acceptable in the eyes of the law. However, if there is an element of fraud, deceit and duress, it is null and void. Both Islamic and common laws of contract accept this condition.

Intention to create legal relations

A valid contract without the intention to be legally bound by it will not be enforced. For instance, a promise made by a husband to give his wife say, ₦2000 (two thousand naira) is a domestic agreement. This is because it is presumed in law that the parties to domestic affairs do not intend to create legal relation. Even if it is commercial agreements and it is stated clearly that the agreement should not be subject to legal jurisdiction in the law court, it is legally not enforceable. However, if in commercial contracts, the intention not to create legal relation is not stated clearly, it is strongly presumed that legal relation is intended and the contract is enforceable in law courts[44]. In both laws of contract, the intention matter. However, in Islam, if the agreement is to do evil or to do something that is non- Sharī'ah compliant, and one of them should sue the other or the case is known and reported, then the court has the power to adjudicate the matter and pass appropriate judgement in line with the Sharī'ah. Both of them would be made to face the wrath of the law. Islamic law of contract does not also support mere puffs in contract. The promise made to an offeree about a product must not be tantamount to telling a lie. Islam frowns at saying what one cannot do or what one's product cannot do.

[43] Olusegun Yerokun, 45.

[44] G.H. Trietel, The Law of Contract, (London: Sweet and Maxwell Limited, 1987), 104

Genuineness of contract /mutual consent

For a contract to be valid in both laws, there must be genuineness of consent. That is, the agreements of the parties to a contract must not be obtained under misrepresentation, mistake, duress and undue influence. Misrepresentation which is classified into three: innocent, fraudulent and negligent is an untrue statement that relates to some existing facts or past events made by one party to induce the other party to enter into a contract. Innocent misrepresentation is a representation made unknowingly and without an intention to deceive. A negligent misrepresentation is when a party to a contract carelessly makes untrue statements. A fraudulent misrepresentation is a false statement made recklessly and knowingly to be untrue i.e. absence of honest belief[45]. Both laws condemn misrepresentation.

In this case, mistake is an erroneous belief that is not in accord with the facts, whether it is of fact or law. It renders the contract void. Inoperative mistakes such as mistakes relating to the meaning of a trade restriction and quality due to errors of judgement do not render contract invalid. Operative mistake such as common mistake (unknown to both offeror and offeree that the subject had been destroyed at the time of making the contract-Res Extincter), mutual mistakes (both parties mistakenly believed that they were contracting for the same article but in fact they have different articles in mind) and unilateral mistake (where only one is under a mistake) render the contract invalid. However, the fact and circumstances of the case may render unilateral contract null and void in Islamic law of contract. Unilateral mistake may be valid in common law because the other party did not induce it[46]. Unilateral mistake is when one party is under a mistake of fact and this is known to the other party that the first party is labouring under a mistake. *Non est factum* is when a person was induced to sign a document that contains fundamentally different terms from what he thought he was signing. Duress is when the true consent of the party cannot be given freely due to actual violence or threats of violence. Undue influence is where one party to the contract uses his position to induce the other to enter into a contract he would not have entered e.g. Imam and congregation, parent and child i.e. undue influence is presumed either through the use of physical force or threats or other forms of compulsion particularly if they are in a fiduciary relationship. The legal effect of such contract is that it is voidable. Mistakes, undue influence and duress can impair the *consensus ad-idem* of the parties in both laws of contract. If they are allowed to curtail and prejudice their freedom, the contract is void. If a contract is entered into through coercion (*ikraah*), *consensus ad-idem* is lacking (Q2:256). The contract is voidable in both laws of contract. The effect is that the injured party can affirm or avoid the contract. All the stated points and their varieties render contract void in both laws.

Contractual capacity of the parties in a contract

Some classes of person rendered incompetent or have unlimited capacity to enter contractual relationship are infants, drunken persons and insane persons. However, in common law, although an infant cannot enter into a contract, they are bound on contracts for supply of basic necessities sold and delivered, and for their training and education. That is to say, the law will make them pay for the services rendered for them, and will enforce that obligation against their estate. Other contracts are voidable, void and unenforceable unless they are ratified when the

[45] Financial Training Courses, *Law* (London: Financial Training Company Limited, 1989), 4.9

[46] Oladele Olayiwola, Emiaso Miapo, Olaiya and Oransanya Lekan, , *Business Law*, (Lagos: Institute of Chartered Accountants of Nigeria, 2014), 136-138.

infants have attained majority (an approved age under the Law). Insane and drunken persons can ratify contract during lucid period. Lucid period is a period when a drunken person or an insane person has the mental capacity to fully comprehend the full import of the contract[47].

Under the Islamic law of contract, there is no minimum age of maturity. It varies. What determines maturity is *buluugh* (age of discretion and reason). This is when a boy first gets a wet dream and a girl first experience menstruation. However, different schools of thought fixed different ages for both males and females in relation to maturity. Imam Malik Hanafi fixes seven years, at this age, if they understand the contract and its consequences; and they have a good judgement on it, they make a valid contract. If a contract is made during lucid period of an insane person or a drunkard, it is binding on him whether the other person was aware of his condition or he did not know his situation. In Islam, it is not allowed to enter contractual relationship with insane people and drunken persons during their lucid period. This is because the period may be difficult to determine. It is part of *umuurun mushtabihhaat* (ambiguous matters)[48]. The Prophet is also reported to have said: 'Leave that about which you are in doubt for that about which you are in no doubt'[49]. A Muslim must not even involve in drinking liquor let alone to the extent of losing his sense (Q5: 90-91).

Certainty of Terms of Contract

Terms of contract must be carefully worded and clearly stated so as to be devoid of ambiguity. If it is to be verbally expressed, it must be clearly stated. The purpose of this condition is to avoid cheating, dispute, conflict and all forms of fraud. The terms may consist of statements, promises, stipulations, exception and exclusions. The terms of contract determine the extent of each party's rights and duties. They also provide the remedies available if they are broken. If a contract lacks certainty, it may be void. There should be a clear understanding of terms of contract between both parties before entering into a suitable, legal and binding contract. Both express and implied terms (a term that is inferred from the express terms of a contract) may render a contract valid or void. The contract is terminated if there is a breach in the essential terms called condition. However if the breach involves a non-essential called warranty, the injured party may sue and claim damages[50]. Both laws of contract adhere to the certainty of terms of contract. In fact, the Qur'an's injunction on it is firm. It gives the instruction and merits of writing contract in a clear way thus:

> O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write it between you in justice. Let no scribe refuse to write as Allah has taught him. So let him write and let the one who has the obligation (i.e, the debtor) dictate. And let him fear Allah, his Lord, and not leave anything out of it. But if the one who has the obligation is of limited understanding or weak or unable to dictate himself, then let his guardian dictate in justice. And bring to witness two witnesses from among our men. And if there are not two men (available), then a man and two women from those whom you accept as witnesses- so that if one of them (i.e. the women) errs, then the other can remind her. And let not the witnesses refuse when they are called upon.

[47] Oladele Olayiwola, Emiaso Miapo, Olaiya and Oransanya Lekan, , *Business Law*, (Lagos: Institute of Chartered Accountants of Nigeria, 2014), 132.

[48] O.A. Musa Abdul, *The Selected Traditions of Al-Nawawi, Forty Traditions of Al-Nawawi,* (Lagos: Islamic Publications Bureau, 1982), 29-30.

[49] Musa Abdul, 37.

[50] Financial Training Courses, 5.8.

> And do not be too weary to write it, whether it is small or large, for its (specified) term. That is more just in the sight of Allah and stronger as evidence and more likely to prevent doubt between you, except when it is an immediate transaction which you conduct among yourselves. For them, there is no blame upon you if you do not write it. And take witnesses when you conclude a contract. Let no scribe be harmed or any witness. For if you do so, indeed, it is grave disobedience in you. And fear Allah. And Allah teaches you. And Allah is knowing of all things (Q.2:282).

Legality and Illegality of Objects of the Contract

Any contract which is made for legal purpose is lawful. Issue of illegality is broader and wider in Islamic law of contract than common law of contract. The contract is null and void in both laws if it is made to commit illegal acts such as to defraud, to commit crime, to promote corruption, to prevent the course of justice, to promote sexual immorality, to deprive the state of the revenue etc. Some contracts that are legal in common law are illegal in Islamic law of contract. Contracts that involve the selling and buying of pork, blood of dead animal, idols, liquor, casino etc. are not prohibited by statutes and also not illegal at common law. But they are prohibited in Islamic law of contract based on the injunctions of Allah as contained in the Qur'an (Q.2: 172-172; Q.5:3; Q. 6:122,146; Q.16:115).

Objective (*niyyah*)

In Islam, intention comes first. The objective of entering into a contract must be legal and lawful. If the contract is legal and lawful and the intention of entering it is unlawful, the contract is null and void. Prophet Muhammad (PBUH) is reported to have said: 'Actions are judged by motives (objectives) (*niyyah*), so each man will have what he intended. Thus, he whose migration (*hijrah*) was to Allah and His Messenger, his migration is to Allah and His Messenger; but he whose migration was for some worldly things he might gain, or for a wife he might marry, his migration is to that for which he migrated'[51].

In the above stated Hadith, the importance of intention is clear. The Prophet gave three examples to illustrate the importance. The first is an example of having good and sincere intention towards *ibaadah* (worshipping Allah) because it is done for the sake of Allah and His Messenger; the second and the third bad intentions are *hajj* (pilgrimages) done for the sake of worldly gains or for marriage respectively. If a person goes for *hajj* for the sake of Allah, Allah will accept his pilgrimage and reward him. However, if the original purpose of going for *hajj* is to have access to a person with a view to marrying the person or to do shopping or to do a business, his *hajj* will not be accepted because it is not for Allah's sake. By implication, if the subject matter of a contract is to build a house for prostitution business or to manufacture a weapon for killing innocent people, to get a loan to establish a gambling business or to sell grapes for the other party to extract liquor from them etc, the contract is invalid. Despite the building of house, manufacturing of a weapon, getting a loan and selling grapes are lawful and Sharī'ah compliant, the underlying intention have rendered those items mentioned unlawful and have rendered the contract invalid[52].

[51] O.A. Musa Abdul, *The Selected Traditions of Al-Nawawi, Forty Traditions of Al-Nawawi*, 18-20.

[52] Muhammad Tahir Mansur, *Islamic Law of Contracts and Business Transactions*, 43-45.

Caveat emptor and *Caveat venditor* in relation to Contract

Contract has a number of issues in the area of sales that are not permissible in Islam. For instance, when a person wants to buy something, he must not be negligent. He must take necessary measure to be sure of what he wants to buy i.e. caveat emptor. Caveat emptor is a Latin word which means 'let the buyer beware'[53]. The concept of this maxim is that the buyer should be careful to inspect the goods he wants to buy before buying. If he finds any defect in the goods, he may decide to buy or not to buy it. If at the end of his inspection, he bought the goods he cannot complain later if he finds a defect in it i.e. if at the end of his inspection and he was satisfied that he was allowed by the seller to inspect the goods he cannot, thereafter, return the goods with the excuse that there is a defect in the goods. This principle protects the seller while the potential buyer is at risk if his inspection could not detect the effects in the goods. However, in Islam, the interest of both the offeror and offeree i.e the seller and buyer is well protected. As Islam wants the buyer to be careful when buying, the seller should also declare all the material facts including the defects in the goods to the potential buyer. Thereafter, he can leave him to take his decision to continue with the contract or to withdraw. The issue of disclosure of necessary pieces of information as regards the subject matter by the offeror (the seller)[54] which is called Caveat Venditor is well documented in the Hadith of the Prophet Muhammad thus: 'Allah's Messenger (PBUH) once came upon a heap of grain, and when he put his hands inside it, his fingers felt some dampness. So, he asked the owner of the grain, 'what is this, O owner of the grain?' He replied, 'Rain had fallen on it, O Allah's Messenger'. He said, 'why did you not put it (the damp part) on the top of the foodstuff so that people might see it? He who deceives has nothing to do with me'. Reported by Muslim[55]

This Hadith confirms that cheating is a prohibition in Islam. The Prophet said in the Hadith that the act of cheating is not worthy his people. Anyone who desires to be his followers must be honest to his customer. He should disclose all relevant and hidden information to his buyer. This is because he knows all the ingredients and contents of his product. The product may be rebranding to give it a different look with the aim of deceiving his customer or and to inflate the price of the product that has the same substance. A popular saying in Yoruba language says; '*A ki gbon bi e ni ti ntan ni*' meaning you cannot be as wise as the one who wants to deceive you. Therefore, in Islam, if the seller who is aware of the defect in his goods but fails to bring to the notice of the buyer, the latter has a legal right to return the goods and take back his money.

Consensus *ad-idem* (meeting of the minds)

Both common and Islamic laws of contract require mutual consent of the parties to a contract. There must be consensus ad-idem on a contract before it can be valid. This is when the parties to a contract agree upon the terms of the contract in the same sense. The validity of the maxim is determined by the presence of consensus ad-idem. In its absence, a contract is deemed impaired and its validity prejudiced. Consensus ad-idem (mutual consent) that will not make a contract impaired and will not prejudice its validity has been expressively stated in the Qur'an (Q 4: 29). However, if the meeting of the minds is on non- Sharī'ah products such as pork and

[53] Andrea Borroni and Charles Tabor, "*Caveat Emptor's* Current Role in Louissiana and Islamic Law: Worlds apart yet surprisingly close", *Journal of Civil Law Studies*, Vol. 2, No.1, 2009, 61-100.

[54] Andrea Borroni and Charles Tabor, 61-100.

[55] M. I., Ismail, *Bulughul Marami.* part I.(Riyadh: Dar-us-salam Publications, 1996), 286.

liquor and services such as prostitution, the contract is null and void. This is another area of divergence between the two laws

Discharge of Contract

Contract is said to be discharged if it comes to an end or it is terminated. It can come to an end by performance (both parties have performed their obligations), breach (one party has failed his own part), agreement (both agree to bring it to an end), frustration (the subject matter of the contract has been destroyed due to an act outside the control of the parties called *force majeure*. Lapse of time, death, insanity of the party, bankruptcy of the party, illegality of the subject matter, flood, war etc., may frustrate contract[56]. The primary way to discharge a contract in both Common and Islam law is through performance. It is the only performance that upholds the fundamental principle of *pact sunt servanda*[57]. In Islamic law, the operation of the law will automatically discharge the contract if it is not valid or it is against the Sharī'ah. In common law, contracts that are illegal are also discharged by the operation of law. Death of a party whose personal act is required brings the contract to an end under both Islamic and Common laws of contract. When the subject matter of the contract which is the foundation upon which other essential contractual elements rest falls, the contract falls; and that automatically terminates the contract.

Merits of contract

It is stated in the Qur'an that when the terms of contract are in writing, they will be able to use the document as an evidence if there is a dispute. It also shows that there is a contract if a party should forget the terms of contract, the party can be referred to the document. Both parties can also be reminded of the terms of the contract. However, contracts can also be made orally. The parties should note the implication of cheating or avoiding the performance of a valid contract entered in to when Allah considers it a great sin before Him (Q.61:2-3). It ensures peace, order, security and efficient and effective operation of businesses because it makes people to live up to their promises. This is because they know that if they fail, the court will enforce the law; and sanctions will be imposed on them.

Some Findings

The study revealed that contracts that involve gambling, games of chance, non-*Sharī'ah* compliant services (such as prostitution, obscenity etc) and products (such as pork, liquor, idols, dead animal, blood of dead animal, any kind of intoxicant etc), *ribā* (interest) whether simple or compound are null and void based on the injunctions of Allah as contained in the Qur'an (Q.2: 172-172; Q.5:3; Q.6:122,146; Q.16:115). However, these are allowed in common law of contract. The work shows contracts of growing grapes to extract liquor, sale and buy back etc are invalid because the purpose of the contract opposes the *Qur'ān*ic text and Hadith. i.e. if the objective or purpose of entering into a contract is against the Sharī'ah even if the object of the contract is lawful in Islam, the purpose renders it void and unlawful as actions

[56] Financial Training Courses, 5.2- 5.14

[57] Saba Habachy, "Property, Right and Contract in Muslim Law", *Columbia Law Review*, vol. 62. No. 3, 1962, 450-473

would be judged according to one's intention. Common law of contract does not take intention into consideration in its principles.

While Islamic law of contract does not allow a person to enter into a contractual relationship with an insane person or a drunken person during his lucid period because of difficulty in determining the extent of his sanity and it is also part of *umuurun mushtabihhaat* (ambiguous matters), Common law allows contract to be concluded during lucid period i.e. if a contract is made during lucid period of an insane person or a drunkard, it is binding on him whether the other person was aware of his condition or he did not know his situation. The philosophy of Islamic law of contract recognises God while this is not in the view of the contracting parties in common law. They don't recognise the hand of God in their dealings. They believe in only their bargaining power. The former has Divine origin while the latter is man-made.

The rules of Islamic law of contract are very similar to those of common law of contract in the areas of offer, acceptance, mutual consent, terms of contract, termination of contract etc. Fraud *Khilābah*, *Tadlīs* (fraud), *gharar* (misinterpretation), *ghabn* (cheating), *gishsh* (deception) etc are differents forms of fraud that render contract invalid within Islamic and Common laws (Q. 83:1-6). Contingent sale, false swearing, hiding defects, short weight etc are also not allowed in the two. A contract that is against religion, life, progeny, intellect and property is not in line with Islamic and Common laws (Q. 5:32; Q. 2:179; Q. 4:29). *Pacta sun servada* which means contracting parties must abide by their stipulation is present in both laws.

In Islam, Muslims are commanded to fulfil all obligations attached to a contract as man-made law enjoins all the parties to fulfil their covenant. Inadequate consideration is acceptable and does not render a contract invalid provided the parties are satisfied and consented freely to the agreement without undue influence, all forms of fraud, coercion and other ambiguities. The contract is null and void in both laws if it is made to commit illegal acts such as to defraud, to commit crime, to promote corruption, to prevent the course of justice, to promote sexual immorality and to deprive the state of the revenue. The interest of both the offeror and offeree i.e. the seller and the buyer is well protected. As Islam wants the buyer to be careful when buying, the seller should also declare all the material facts including the defects in the goods to the potential buyer. People should fulfil their contractual obligations to ensure peaceful coexistence, order, security and efficient and effective operation of businesses. Modern systems of communication such as e-mail, telephone, fax, telex, etc. can be used to make offer and acceptance in a contract for convenience sake. However, all forms of fraud and deceit must be avoided when using them.

Conclusion

It is clear that contract in Islam is wider and broader than Common law of contract in the sense that it does not only bind Muslims with their fellow Muslims and non- Muslims, but also creates a pact between man and God. In Islam, when a pact has been concluded between Muslims and Muslims or with non-Muslims, it must be upheld and respected. They must be loyal and faithful to their promises i.e. a contract is binding between the parties irrespective of their religions, race, tribe and ethnicity. It is also inferred from our discussion that all contracts are allowed in Islam except those that are not directly and indirectly Sharī'ah compliant. Referring to selling what is not in existence as *gharar* and considering it prohibited is not always correct. Prohibition is not limited to non-existent products; it covers also some products that are in existence. It is not the state of the non-existence or existence that makes them prohibited. It is

uncertainty, doubt and lack of knowledge regarding the subject matter. All the mentioned impediments can be eliminated if the quality, quantity and special requirements of the present and future goods are known. The knowledge may be through modern technology. The issue of *caveat emptor* is sufficient in Islamic law of contract, caveat venditor is equally very important and must be considered. This is not emphasised in common law. Both written and oral contract are valid. However, both favoured writing contract more than concluding contract verbally. Of the primary ways to discharge a contract in both Common and Islamic law, it is the only performance that upholds the fundamental principle of *pact sunt servanda*. Contract ensures peace, order, security and efficient and effective operation of businesses because it makes people to live up to their promises. This is because they know that if they fail, the court will enforce the law; and sanctions will be imposed on them.